U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
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DATE: April 3, 2000
CASE NO.: 2000 - INA - 54

In the Matter of:
JACK JENKINSON,
Employer,

on behalf of

ALVIN VALENZONA,
Alien.

Appearance: Gloria Calonge, Esq.
Falls Church, VA

Certifying Officer: Richard Panati
Philadelphia, PA

Before: Holmes, Vittone, and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Alvin Valenzona ("Alien") filed by Employer Jack Jenkinson ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, Philadelphia, Pennsylvania, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor, and 2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly

employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). All parties were served with a Notice of Docketing and Order Requiring Statement of Position or Legal Brief on December 2, 1999; they were notified that all parties had twenty-one (21) days to submit a statement or brief, and such was required if a grounds of appeal was not stated in the request for review by the Board of Alien Labor Certification Appeals (the "Board").

Statement of the Case

On November 4, 1996, Employer filed an application for labor certification to allow him to fill the position of "Domestic Cook (Live-in/Live-out)" in his Centreville, Virginia home. The application was amended on June 4, 1997, and in final form described the position as follows:

> "Plan and cook meals in employer's household, according to recipes or tastes of employer. Prepare the following types of cuisine: Oriental, Filipino and American. Peel, wash, trim and prepare vegetables and meats for cooking. Cook vegetables and bake breads and pastries. Boil, broil, fry and roast meats. Plan menus and order foodstuffs. Clean kitchen and cooking utensils. Serve meals. Prepare fancy dishes and pastries. Prepare food for special diets. Plan menus, prepare and serve for occasional dinner and overnight guests, etc."

A high school education and two years of experience in the offered position were required, as were verifiable references, good personal hygiene, and no smoking or drinking on the job. A forty hour week, with overtime as needed, was called for. The cook would work a split shift, from 7:30 a.m. to 11:30 a.m., and 12:30 p.m. to 3:10 p.m.. The position paid $11.47 per hour, with time and a half for overtime. (AF 146).

The transmittal form from the Virginia Employment Commission dated August 18, 1997 indicates that there were no applicants for the position as a result of posting and advertising. (AF 144).

A Notice of Findings ("NOF") was issued on June 29, 1998 which proposed to deny the

application based upon a failure of Employer to demonstrate that the position was full-time. Therefore the job did not meet the definition of employment at 20 C.F.R. § 656.3. Employer was requested to show how the described duties would occupy the Alien for the full work day. (AF 142-143). Employer requested, and was granted, an extension of time to respond. (AF 140, 141).

Employer submitted his Rebuttal on August 28, 1998. It consisted of a cover letter from counsel, a two page letter from Employer detailing the duties and hours of the cook, an entertainment schedule for the prior twelve months, documentation of house guests, and checks detailing food expenditures and payment of other household workers. (AF 49-139.)

A Final Determination ("FD") denying certification was issued on September 4, 1998. The CO found that Employer had failed to show that the position was indeed full-time, and therefore did not constitute employment as defined by the regulations. Most family members would be out of the home for part of the cook's work day, and hence the duties for lunch were overstated. Further, Employer did not supply specific schedules for family members, as requested, and the CO presumed that the cook, who left at 3:10 p.m., would be gone before Employer or his spouse returned home. (AF 45-46).

Employer requested administrative review on September 21, 1999. (AF 43-44). Upon review, the Board remanded the case to the CO for reconsideration in light of the recent *en banc* decisions in Daisy Schimoler, 1997-INA-218 (Mar. 3, 1999)(*en banc*) and Carlos Uy III, 1997-INA-481 (Mar. 3, 1999)(*en banc*). In those cases, the Board stated that the definition of employment in the regulations could not be used to attack the application based upon a recitation of the hours worked. Instead, the proper inquiry should focus on whether the position is a *bona fide* job opportunity. The test for evaluating the position is a totality of circumstances test, under which full-time employment is only one factor. Schimoler, Uy, *supra*. (AF 37-38).

On May 12, 1999, the CO issued a supplemental NOF on remand ("NOFR") which again proposed to deny the labor certification. The CO found that pursuant to 20 C.F.R. § 656.20(c)(8), the Employer had not shown that a *bona fide* job opportunity clearly open to U.S. workers existed. The problems faced by immigrants to the U.S. caused by the unavailability of visas for unskilled workers was cited as a reason for more closely examining applications for skilled workers, such as Domestic Cooks. The NOFR requested responses to twelve inquiries aimed at detailing the duties of the Alien, the make-up of the household, and the need for a domestic employee. The Employer was warned that documentation was advisable, as bare responses to the inquiries might not be sufficient to meet Employer's burden. (AF 34-36).

Employer filed a second Rebuttal ("Rebuttal 2") on July 20, 1999 after obtaining an extension of time. (AF 32, 33). This consisted of a cover letter from counsel, a three page letter from Employer responding to each inquiry made by the CO, documentation of entertainment, a 1998 tax return, and copies of checks paying for other household services. Employer stated that the cook would prepare 3 meals and one snack per day, which was estimated to take seven hours in total. Breakfast was a full meal for Employer, his wife, and his mother. There are no children.

Lunch was sometimes packed for Employer and his spouse, and his mother always ate at home. Dinner was a full meal, and on occasion multiple dinners were prepared to satisfy the differing tastes of the household members. Employer worked a 9-5 schedule as an architect, while his wife worked 8:30 to 6. No special dietary restrictions were stated. Finally, Employer noted that Alien had worked for his spouse's family in the Philippines. (AF 5-26).

Certification was denied by a second FD ("FD 2") dated September 1, 1999. The CO felt that the evidence did not support a finding that the position of Domestic Cook was *bona fide*, and that in reality, the Alien would be a general domestic worker. The CO specifically cited the absence of 2/3 of the household during the day, and the fact that the cook's day ends at 3:10 p.m., long before the dinner hour. (AF 3-4).

Administrative review was requested on October 5, 1999, on the grounds that the CO's decision was arbitrary and based upon a preconception against Domestic Cooks. Further, the Employer argued that under the totality of circumstances test, the position had been shown to be *bona fide*. (AF 1-2). A brief was filed with the Board on December 16, 1999.

Discussion

The Employer bears the burden of proving the elements necessary to establish entitlement to labor certification. 20 C.F.R. § 656.2(b). The Employer complains that this burden is increased because the CO applied a "preconceived notion" against the position of Domestic Cook. It is true that the CO considered the evidence and arguments of Employer in light of his experience and expertise, but in no way did that alter the burden of the Employer. The denial was not "arbitrary," but was instead based upon the situation detailed, as Employer noted, in the NOFR. There is an effective freeze on issuance of visas for unskilled workers, and therefore the Department of Labor is ensuring that the available skilled worker visas are indeed used for skilled workers, one of which is the position of domestic cook. We reject the Employer's first argument of bias against domestic cooks in general; there is no presumption against the position, and it is entirely permissible, and indeed desirable, for CO's to apply their experience and expertise in evaluating applications.

We agree with the decision of the CO, and find that Employer has failed to show by a totality of the circumstances that the position of "Domestic Cook (Live-in/Live-out)" is a *bona fide* job opportunity. The duties listed by the Employer and the schedules for Alien and household seem at direct odds. As the CO noted, the Alien would quit work at 3:10 each day, yet the Employer maintains that he would prepare a complete meal for dinner, and would serve and clean up after the meal. Additionally, no one but Employer's mother is home until at least 5:00. It is unclear how the cook could reconcile the duties and the schedules. Overtime is mentioned, but the above situation would require such every day. We also agree with the CO that the absence of both Employer and his wife during the day does indicate that the duties of the Alien during the day would be very light, and are overstated by Employer. While full-time employment is not the sole factor under which to evaluate an application, it is a circumstance to be considered.

Uy, *supra*.

Additionally, we note that the application lists "Prepare food for special diets" as a duty, but the Employer very clearly states that there are no special dietary requirements in his household. (AF 5). Cooking nutritious foods, low in fat, to meet the preferences of a household member is not a special dietary requirement. This conflict in stated duties supports the finding that this is not a *bona fide* position.

Finally, we note that there is a prior, and apparently substantial tie between Employer and Alien, as Alien had been previously employed by Employer's wife's family in the Philippines. Employer asserts that this tie "negates any hint of regulatory circumvention" (AF 2), but fails to explain how this is so. We find that it is permissible to draw an adverse inference from the relationship. Employer may have a personal interest in the labor certification process beyond allegedly desiring to hire a domestic cook.

Order

Based on the foregoing, the Final Determination of the Certifying Officer is affirmed, and labor certification is denied.

For the Panel:

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John C. Holmes
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis

for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.